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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of the Telecommunications )  
Act of 1996: )  
 )  
Telecommunications Carriers' Use of )  
Customer Proprietary Network Information )  
and other Customer Information )

CC Docket No. 96-115

COMMENTS OF COX ENTERPRISES, INC.

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## SUMMARY

These comments by Cox Enterprises, Inc. ("Cox") respond to specific questions posed by the Common Carrier Bureau (the "Bureau") in this proceeding about Bell Operating Company ("BOC") use of customer proprietary network information ("CPNI"). Two general themes are central to these responses. First, the Commission must confirm that Sections 272 and 274 of the Communications Act expand upon, and do not restrict, the application of Section 222 to BOCs and their affiliates. Second, the Commission must confirm that Section 222 requires specific customer consent for the release of CPNI.

Section 222 is a general statutory provision governing the use of CPNI by all "telecommunications carriers." It is distinct from the limitations imposed on BOCs under Sections 272 and 274 of the Communications Act. Sections 272 and 274 may permit BOCs to provide manufacturing, long distance, interLATA information and electronic publishing services under limited circumstances and pursuant to various structural and transactional safeguards. However, it cannot and should not be argued under standard principles of statutory construction that BOCs are exempted by Sections 272 and 274 from compliance with other provisions of the Communications Act, including Section 222.

Section 272(g), for instance, while permitting joint marketing, provides only limited guidance on how that marketing may be conducted. The remainder of the Communications Act, including Section 222, provides that guidance. In particular, the use of CPNI for BOC joint marketing of local exchange and long distance service is subject to Section 222.

Section 274 also does not limit a BOC's obligation to protect CPNI and is not inconsistent with an affirmative obligation to obtain authorization before using a customer's



CPNI. For instance, Section 274(c)(2)(A) permits joint inbound telemarketing, but does not contain language limiting the applicability of the inbound telemarketing provision in Section 222(c)(3). In fact, Section 222(c)(3) applies only if CPNI is obtained in the course of inbound telemarketing. These examples confirm that Section 222 remains applicable to both the BOCs and their affiliates, notwithstanding Sections 272 and 274.

The Commission should recognize that different types of CPNI raise different levels of concern. At the lowest level, oral consent to use may be permissible without specific disclosures of how the information will be used and in only limited circumstances. Information that has some competitive value, such as the volume of a customer's use of a service, should be subject to more rigorous requirements, including specific, written disclosures of how the information will be used and formal records of consent. Finally, extremely private information, such as the specific phone numbers called by a customer, should be available only after the customer receives a complete written disclosure describing all permitted uses of the information and gives specific written consent.

The Commission also should confirm that Section 222 requires affirmative consent and does not permit "negative option" consent to the use or disclosure of CPNI. This conclusion is consistent with the statutory language of Section 222, which speaks only of affirmative forms of consent for access to CPNI. It also is consistent with past Congressional actions concerning consumer privacy, because Congress specifically has adopted opt-out language when it wanted to permit negative options.

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Implementation of the Telecommunications	)	CC Docket No. 96-115
Act of 1996:	)	
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network Information	)	
and other Customer Information	)	

**COMMENTS OF COX ENTERPRISES, INC.**

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits these comments in response to specific questions posed by the Common Carrier Bureau (the "Bureau") on February 20, 1997 in the above-referenced proceeding.<sup>1/</sup> Cox is responding to these questions to encourage the Commission, in the strongest terms possible, to ensure that Bell Operating Company ("BOC") use of customer proprietary network information ("CPNI") neither improperly invades customer privacy nor inhibits the development of competition in the telecommunications marketplace. Congress clearly intended to limit BOC use of CPNI. That intent must be reflected in the rules promulgated by the Commission in the above-referenced proceeding.

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<sup>1/</sup> See *Public Notice*, "Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking," CC Docket No. 96-115, DA 97-385 (rel. February 20, 1997).

## QUESTIONS

### **I. Interplay Between Section 222 and Section 272**

#### **A. Using, Disclosing, and Permitting Access to CPNI**

- 1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of ... services... and information ... " mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

The requirement in Section 272(c)(1) that a BOC may not discriminate between its Section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." means that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if access to the CPNI is made available to all other entities. The express language of Section 272 provides that BOCs cannot discriminate in favor of their affiliates in the procurement or provision of "information." Moreover, the legislative history of the Telecommunications Act of 1996 (the "1996 Act") expressly recognizes that certain provisions of Section 272 are intended to: (1) ensure that BOCs protect the confidentiality of proprietary information; and (2) prohibit the sharing of proprietary information with BOC subsidiaries or affiliates unless the information is available to all other persons on the same terms and conditions.<sup>2/</sup> In addition, the evidence of BOC abuse of CPNI in the provision of competitive services makes it all the more imperative to ensure that such abuses do not persist.<sup>3/</sup>

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<sup>2/</sup> See Jt. Statement of Managers, S. Conf. Rept. No. 104-230, 104th Cong., 2nd Sess. 150-152 (1996) ("Conference Report").

<sup>3/</sup> The Commission found that BellSouth had used CPNI to target customers of competing voice mail providers through a practice known as "unhooking." *Computer III*

Accordingly, the specific restrictions imposed on BOCs under Section 272 are consistent, and at least coterminous, with the CPNI restrictions of Section 222.

As an initial matter, Section 222 is a general statutory provision governing the use of CPNI by all "telecommunications carriers." Section 272 imposes additional, specific structural and transactional requirements on BOC in-region long distance services, manufacturing and interLATA information services. Consequently, Section 272 must be interpreted in a manner consistent with the *continuing* obligations imposed on all telecommunications carriers under Section 222.<sup>4/</sup> An interpretation of the provisions of Section 272 that is inconsistent with Section 222 would permit BOCs to unlawfully share information during the period in which Section 272 remains in effect. This would contradict the express language of the statute, as well as Congress' intent to restrict the shared use of information between the BOCs and their subsidiaries.

2. **If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?**

Section 272 of the 1996 Act must be interpreted to be consistent with the general prohibitions and exceptions of Section 222. Accordingly, the non-discrimination provision in

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*Remand Proceedings*, 6 FCC Rcd 7571, 7613-4 (1991). See also *California v. FCC*, 39 F.3d 919, 929 (9th Cir. 1994), citing *Commission's Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service*, Docket No. 4000-U (Ga. Pub. Svc. Com. June 4, 1991) at 27-34 (describing three specific examples of types of discriminatory behavior by Southern Bell).

<sup>4/</sup> In addition, and as Cox has described previously, there are no conflicts between Section 222 and Section 272. See Letter of J.G. Harrington, Dow, Lohnes & Albertson, to William F. Caton, Acting Secretary, Federal Communications Commission, February 20, 1997, attachments (the "February 20 Letter") (attached hereto).

Section 272(c)(2) requires the BOC subsidiary to be treated as a third party under Section 222.

This means that a BOC must have a customer's affirmative written request before disclosing CPNI to its affiliate. Unless affirmative written consent is required under Section 272, BOCs would be permitted to share sensitive information with subsidiaries or affiliates more easily than with third parties. Such a result directly contradicts the non-discrimination language of Section 272(c), as well as Congress' intent to minimize the potential for anti-competitive use of CPNI by the BOCs.

3. **If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222 (c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange services and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?**

While Section 222 applies to all telecommunications carriers, Section 272 applies only to BOCs. Section 272 imposes *additional* obligations on the BOCs in recognition of their control over bottleneck facilities and their unique access to customer information.<sup>5/</sup> The Commission should not attempt to extend Section 272 obligations to other provisions of the 1996 Act. Indeed, non-BOC entities should not be subject to limitations on affiliate interactions that were intended by Congress to be applied only to BOCs.

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<sup>5/</sup> See *Notice of Proposed Rulemaking*, Implementation of Non-Accounting Safeguards of Sections 271 and 272, CC Docket No. 96-149 (rel. July 18, 1996) (recognizing that the BOCs' control of essential local exchange facilities provides the BOCs with the opportunity to take actions that favor its competitive affiliates and weaken the affiliates' rivals).

## **B. Customer Approval**

- 4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?**

Section 222 applies uniformly to all telecommunications carriers regarding the manner in which customer approval for the disclosure of CPNI is obtained. If a BOC may obtain oral approval for a proposed use of CPNI, and bases its disclosure or use of CPNI on that oral approval, it must disclose CPNI to unaffiliated entities using the same method.<sup>6/</sup> Indeed, Section 272 expressly requires that BOCs make CPNI available to third parties on a non-discriminatory basis.

- 5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?**

Section 222 applies uniformly to all telecommunications carriers. To the extent non-BOC affiliated interexchange carriers or independent LECs disclose CPNI to unaffiliated entities pursuant to pre-determined standards or guidelines, disclosure of CPNI to any third party under

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<sup>6/</sup> Section 222 does not, however, permit BOCs to use so-called "opt-out" procedures to obtain "consent" to use CPNI. *See* Letter of Alexander V. Netchvolodoff, Vice President of Public Policy, Cox Enterprises, to William F. Caton, Acting Secretary, Federal Communications Commission, January 27, 1997 (attached hereto). *See also* February 20 Letter, attachments.

Section 222 should be made according to identical standards and guidelines. In the case of a BOC, the additional safeguards required by Part III of Title II also will apply.

6. **Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate and unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?**

If a BOC solicits customer approval on behalf of its Section 272 affiliate, the BOC also must offer the same opportunity to obtain approval to unaffiliated entities. This requirement, imposed by Section 272 of the 1996 Act, would mandate that the same facilities and methods be made available to non-BOC affiliated entities for obtaining the same or comparable approvals from BOC customers. For instance, if the BOC attempts to solicit customer approval through the use of bill inserts, non-BOC affiliated competitors must be provided an opportunity to include similar requests in bill mailings. Given the unique ability of the BOCs to use customer information to leverage their monopoly power in the local exchange into competitive markets, and its unique and constant access to its customers, it is critical that the Commission ensure that solicitations for CPNI be made in a non-discriminatory and even-handed manner.

#### **C. Other Issues**

7. **If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1)**

**and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?**

It is important to recognize that Section 272(g)(3) does not "exempt" the activities described in Sections 272(g)(1) and 272(g)(2) from the non-discrimination obligations of Section 272(c)(1). Rather, Section 272(g)(3) provides only that the joint marketing permitted between BOCs and their affiliates pursuant to Sections 272(g)(1) and 272(g)(3) is not a *per se* violation of the non-discrimination safeguards set forth in Section 272(c) of the 1996 Act. Section 272(g)(3) is intended to guide the Commission in construing the remainder of Section 272. It does not relieve the BOCs of the obligation to ensure that their treatment of affiliates does not unlawfully disadvantage their competitors.

Section 272(g)(3) also does not excuse BOCs that enter into joint marketing agreements from complying with the requirements of Section 222. By its own terms, Section 272(g)(3) does not apply Section 222 and, consequently, efforts to solicit CPNI in the context of a joint marketing arrangement continue to be subject to Section 222's requirements. By their nature, joint marketing arrangements, while they may be based on CPNI or aggregate CPNI, are distinct from CPNI solicitations. Indeed, interpreting Section 273(g)(3) to permit unrestricted exchange of CPNI between BOCs and their affiliates simply because the parties have entered into an agreement to jointly market their services would be inconsistent with Section 222. The Commission must interpret these provisions as a whole and in a manner that gives full and equal



effect to the various and sometimes overlapping provisions of the 1996 Act.<sup>7/</sup> Doing so requires the Commission to recognize that Section 273(g)(3) cannot be interpreted to trump Section 222.

8. **To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims the CPNI is not essential for a BOC or section 272 affiliate to engage in those activities, please describe in detail the basis for that position.**

Soliciting customer approval to use, disclose, or permit access to CPNI is distinct from joint marketing, is not an activity described in Section 272(g) and is not essential for the success of a joint marketing venture. In very few circumstances, if any, is customer-specific information required for planning legitimate marketing strategies and implementing marketing programs. Moreover, from the standpoint of user privacy, release of customer-specific information is never in the public interest without the customer's explicit consent. In fact, most joint marketing program and planning is based on aggregate market information that describes purchasing trends, demographic statistics and income and population levels or ranges. This information simply is not "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service . . . that is made available to the carrier by the customer by virtue of the carrier-customer relationship."<sup>8/</sup> Indeed, the information required

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<sup>7/</sup> The governing rule of statutory construction provides that, where "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Moreover, proper statutory analysis requires that all parts of a statute be considered when the meaning of the statute and the intent of Congress is determined. *See Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (courts must look to the "design of the statute as a whole").

<sup>8/</sup> *See* 47 U.S.C. § 222(f) (defining CPNI).

to inform joint marketing efforts and to plan for the introduction of new services is generic and therefore far broader than individual CPNI. Unfettered access to CPNI, outside the procedures required by Section 222, simply is not essential for a BOC or Section 272 affiliate to engage in any of the activities described in Section 272(g).<sup>9/</sup>

9. **Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services...concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement of section 272(e)(2) that a BOC "shall not provide any .... services...or information concerning its provision of exchange access to [its affiliate] unless such... services....or information are made available to other providers of interLATA services in that market on the same terms and conditions"?**

The "information" identified in Section 272(e)(2) includes but is not limited to CPNI. As discussed above, Section 272 is designed to limit the ability of BOCs to leverage their market power in the local exchange into competitive markets, such as long distance. For that reason, Congress adopted the unambiguous requirement that BOCs not make available to their Section 272 affiliates *any information* concerning their provision of exchange access without making the same information available to others on the same terms and conditions.

Similarly, Congress extended this general prohibition to cover "services," which include CPNI-related approval solicitation services. While Section 272(e)(2) may encompass additional services relating to exchange access information, access to CPNI plainly is at the core of this provision.

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<sup>9/</sup> In addition, in circumstances where a BOC or its Section 272 affiliate seeks individual CPNI, it can collect such information to the extent customer approval is given pursuant to Section 222. Indeed, it is in these particular instances where Section 222 safeguards are required to prevent unlawful targeting of BOC customers to the detriment of BOC competitors.

Attempts to construe Section 272(e)(2) to exclude CPNI or CPNI-related approval solicitation services will undermine Congress' express intent to prevent BOCs from engaging in anti-competitive information exchanges and customer solicitations. Indeed, interpreting Section 272(e)(2) to exclude CPNI would be inconsistent with the purpose of Section 272 and would eviscerate the customer privacy and competitive safeguards established in Section 222.

## **II. Interplay Between Section 222 and Section 274**

### **A. Threshold Issues**

- 13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?**

For the reasons discussed in *Question 9*, it is critical that the Commission interpret the term "basic telephone service information" as used in Section 274(c)(2)(B) to include CPNI. Inconsistent interpretations of Section 222 and Section 274 will result in the anti-competitive CPNI use and disclosures that Congress sought to prohibit. The differences in terminology between Section 222 and 274 most likely occurred because Section 222 originated in the Senate and Section 274 originated in the House.<sup>10/</sup> There is no indication in the Conference Report that they were intended to have different meanings.

### **B. Using, Disclosing, and Permitting Access to CPNI**

#### **(i). Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services**

- 14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related to the provision of electronic publishing" to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available, on nondiscriminatory terms, to all unaffiliated electronic**

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<sup>10/</sup> See Conference Report at 203-205.

**publishers who have requested such services? If not, what obligation does the nondiscrimination requirement or section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

To the extent that a BOC provides inbound marketing or referral services related to electronic publishing to its affiliates, or in the context of an electronic publishing joint venture, it is critical that the BOC also make the CPNI available to unaffiliated electronic publishers on non-discriminatory terms and conditions. While Section 222 may provide telecommunications carriers greater latitude in responding to customer inbound marketing requests generally,<sup>11/</sup> Congress took particular care to proscribe discriminatory use of CPNI by BOCs in the provision of electronic publishing. Section 274(c)(2)(A), therefore, mandates that third parties be given access to the same services offered to BOC subsidiaries or joint venture partners, including access to CPNI. The requirement is explicitly set forth in Section 274(c)(2)(A) and should be implemented by the Commission in a manner consistent with Section 222.

**(ii) Section 274(c)(2)(B) -- Teaming or Business Arrangements**

- 15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher," may use, disclose, or permit access to basic telephone service information that is CPNI in connection with the teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?**

As discussed in *Questions 9, 13 and 14* above, CPNI is encompassed within the definition of "basic telephone information." Moreover, as is the case under Section 272, Section

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<sup>11/</sup> See 47 U.S.C. § 222(d)(3).

274 imposes limitations on the ability of BOCs to provide certain services and to share information with their subsidiaries or partners in particular contexts that go beyond the requirements of Section 222. Specifically, Section 274 broadens the types of information that must be made available to third parties on non-discriminatory terms and conditions when BOCs share the information with their electronic publishing subsidiaries and partners. Section 274(c)(2)(B), therefore, should be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher," may use, disclose, or permit access to basic telephone service information that is CPNI in connection with the teaming or business arrangement only if access to such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers.

- 16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?**

To the extent Section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request," Section 274(c)(2)(B) must be interpreted to require that similar approval be obtained if CPNI is disclosed in the context of a teaming or business arrangement. As discussed in *Questions 1 and 2* above, Section 222 is a general provision that applies to all telecommunications carriers. To the extent CPNI is implicated under Section 274(c)(2)(B), therefore, Section 222 also must be given full effect in determining the approval required for the use and disclosure of CPNI under Section 274(c)(2)(B). While disclosure of other information implicated by the broader scope of Section

274(c)(2)(B) may not require the same approval as CPNI, the general limitations established in Section 222 must be observed if the use or disclosure of CPNI is involved. Moreover, the non-discrimination provisions of Section 274(c)(2)(B) would require that entities engaged in teaming or business arrangements with BOCs be treated in a similar manner.

**(iii) Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures**

- 17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?**

For reasons similar to those discussed in *Question 16*, Section 274(c)(2)(C) should be construed to mean that an electronic publishing joint venture is treated as a third party for which the BOC must have a customer's approval, under the standards of Section 222, before disclosing CPNI to that joint venture or to joint venture partners. Moreover, as these comments have described in response to *Question 4*, the approval process expressly excludes opt-out "approvals."

**C. Customer Approval**

**(i) Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services**

- 18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, or electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on the forms of customer approval in connection with section 274(c)(2)(A) activities?**

Because Section 222 applies to all telecommunications carriers, a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, or electronic publishing joint

venture, affiliate or unaffiliated electronic publisher" pursuant to Section 274(c)(A) is required to obtain customer approval before using, discussing or permitting access to CPNI on behalf of such entities. Moreover, the non-discriminatory provisions of Section 274 require that customer approval for the disclosure of CPNI be obtained in the same manner, whether the recipient of the information is an unaffiliated or affiliated entity.

The type of disclosure permitted in these circumstances, however, is directly affected by Section 222(d)(3) of the 1996 Act. While affirmative written consent is required under Section 222(c), Section 222(d)(3) permits oral approval in the context of inbound telemarketing, that is, when the customer communicates directly with the BOC on a call the customer has initiated. Thus, immediate oral approval is sufficient to permit use and disclosure CPNI within this context. As set forth in the answer to *Question 4*, however, opt-out approvals are never permitted under Section 222 of the 1996 Act.

19. **Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its separated affiliated or electronic publishing joint venture also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers when it provides such a service for its section 274 separated affiliates, electronic publishing joint ventures, or affiliates under section 274(c)(2)(A)? What impact, if any, does section 222(d)(3) have on the BOC's obligations under section 274(c)(2)(A) with regard to the solicitation of a customer's approval during a customer-initiated call? What specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 274 separated affiliates or electronic publishing joint ventures or affiliates over unaffiliated entities? If the customer approves disclosure to both the BOC's section 274 separate affiliates or electronic publishing joint ventures or affiliates and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 274 separated affiliates or electronic publishing joint ventures or affiliates?**

As described in the answer to *Question 6*, if a BOC solicits customer approval on behalf of its Section 274 separated affiliate, electronic publishing joint venture or affiliate under Section

274(c)(2)(A), it must offer to solicit the same approval on behalf of unaffiliated entities. This requirement, imposed by Section 274, means that the same facilities and methods must be made available to non-BOC affiliated entities as to the BOC's affiliate. *See Answer to Question 6.*

- 20. To the extent that sections 222(c)(1) and 222(d)(3) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated electronic publishers under the same standard for customer approval as is permitted in connection with its section 274 separated affiliate, electronic publishing joint venture, or affiliate under section 274(c)(2)(A)? If, for example, a BOC may disclose CPNI to its section 274 separated affiliate pursuant to the customer's oral or opt-out approval, is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?**

Regardless of the impact of Sections 222(c)(1) and 222(d)(3) on the *type* of approval that is sufficient to permit use and disclosure of CPNI, the same *method* of approval made available to a Section 274 separated affiliate, electronic publishing joint venture, or affiliate under Section 274(c)(2)(A) must also be made available to unaffiliated electronic publishers. The non-discrimination provisions of Section 274 prohibit BOCs from favoring their separated affiliates or partners to the detriment of unaffiliated competitors. *See Answers to Questions 6, 18 & 19.* Moreover, Section 222 prohibits all telecommunications carriers, including BOCs, from disclosing CPNI pursuant to opt-out approvals. *See Question 4.*

**(ii) Section 274(c)(2)(B) -- Teaming or Business Arrangements**

- 21. Must a BOC, that is engaged in a teaming or business arrangement under section 274(c)(2)(B) with "any separated affiliate or with any other electronic publisher," obtain customer approval before using, disclosing, or permitting access to CPNI for such entities? What forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation?**

As discussed in *Question 16*, Section 222 limits the ability of all telecommunications carriers to use and disclose CPNI. Accordingly, a BOC engaged in a teaming or business



arrangement under Section 274(c)(2)(B) with an separated affiliate or with any other electronic publisher must obtain affirmative written customer approval before using, disclosing or permitting access to CPNI for such entities. As Cox previously has explained, however, "opt-out" or "negative option" consents to use CPNI are not permitted under Section 222 of the 1996 Act.<sup>12/</sup>

- 22. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of any of its teaming or business arrangements under section 274(c)(2)(B) also offer to solicit that approval on behalf of other teaming arrangements and unaffiliated electronic publishers? That is, must the BOC offer an "approval solicitation service" to unaffiliated electronic publishers and teaming arrangements when it provides such a service for any of its teaming or business arrangements under section 274(c)(2)(B)? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its electronic publishing teaming or business arrangements over unaffiliated entities? If the customer approves disclosure to both the BOC's electronic publishing teaming or business arrangements and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its electronic publishing teaming or business arrangements?**

A BOC must offer an "approval solicitation service" to unaffiliated electronic publishers and teaming arrangements when it provides such a service for any of its teaming or business arrangements under section 274(c)(2)(B) for reasons similar to those identified in the answers to *Questions 6 and 19* above.

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<sup>12/</sup> See February 20 Letter. The Commission specifically should recognize that Congress has adopted specific negative option language for disclosure of potentially sensitive information in the past, such as in the Driver's Privacy Protection Act. See 18 U.S.C. § 2721(b)(11) ("For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures"). The Congressional decision not to do so shows that Congress did not intend for a negative option to be available for use of CPNI.